Testimony

Oversight of the Office of Information and Regulatory Affairs

DOUGLAS HOLTZ-EAKIN | JULY 15, 2015

Chairman Marino, Ranking Member Johnson, and Members of the Committee thank you for the opportunity to appear today. In this testimony, I wish to highlight:

- Despite efforts from the administration to eliminate red tape,[1] regulators continue to set new records. The Office of Information and Regulatory Affairs (OIRA) concedes that FY 2012 was the most expensive year in recent history for regulatory costs. According to the Government Accountability Office (GAO), 2010 set a record for the number of "major" rules (100) in a year.
- Full transparency at OIRA remains elusive. Unified agendas and reports to Congress are often late, if published at all, and there is strong evidence that the administration hides data on unfunded mandates and fails to comply with the Congressional Review Act.
- Under Executive Orders 13,563 and 13,610, the administration endeavors to "modify, streamline, expand, or repeal" burdensome regulations. Unfortunately, a review of the administration's reports finds that there is more expansion than repeal. Agencies often list new regulations that add hundreds of millions of dollars in economic burdens in these allegedly "retrospective" reports, and
- There is more the nation can do on regulatory reform to reduce unnecessary burdens while ensuring essential public health protections. Balanced regulatory reform that retrospectively examines past rules and prospectively evaluates the costs, benefits, and regulatory alternatives is an international standard practice, not a partisan exercise.

Let me provide additional detail on each in turn.

THE SCALE OF REGULATORY BURDENS

Although President Obama has issued several major executive orders outlining his vision for the regulatory state, to date there have been relatively modest efforts to "modify, streamline, expand, or repeal" burdensome regulations. Instead, the administration has implemented more regulations to expand than to repeal.[2]

In this regard, here are a few facts on regulations taken directly from the administration's Office of Information and Regulatory Affairs (OIRA) and GAO: Since FY 2000, the paperwork burden from cabinet-level agencies has increased from 7.1 billion hours to more than 9.3 billion hours, a 30 percent increase.[3] Currently, Americans must manage more than 9,200 government forms, imposing 9.9 billion hours of paperwork.[4] In 2010, federal agencies published 100 "major" rules, more than any other year in the history of the Congressional Review Act. OIRA data make plain that FY 2012 was one of the costliest years for regulation in at least a generation.[5] See below.

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The American Action Forum (AAF), in an effort to track 100 percent of federal rulemakings, has tallied the cumulative burden for every year since 2007. Looking to document the impact beyond "economically significant" rules, AAF has tracked thousands of regulations during this period. All of the figures listed below are merely data recorded directly from the Federal Register, the "Daily Journal of the United States Government." AAF does not re-estimate agency figures. If an agency states that a rule will impose $3 billion in costs, or save $3 billion, we record the data as listed each day.

In 2015, the federal government has published more than $128 billion in long-term regulatory burdens from proposed and final rules. At this pace, regulators could impose more than $240 billion in economic burdens, a record according to AAF data. However, OIRA's recordkeeping omits many of these burdens. For example, in FY 2013, OIRA reported $2 billion to $2.5 billion in annual economic costs (2001$).[6] However, OIRA's report only monetized seven rulemakings from the fiscal year.

There are obvious limitations to OIRA's methodology, and some of them are unavoidable, but the federal government imposed more than $2.5 billion in burdens during FY 2013. AAF found 310 federal rules that imposed costs or paperwork burden hours. According to our calculations, the federal government imposed $7.2 billion in costs.[7] Thus, OIRA's reported total was just 31 percent of what was likely published in the Federal Register.

For example, OIRA's report omits scores of significant rulemakings from its total. By failing to quantify the ever-growing burden from independent agencies, the report often undercounts regulatory costs. The Volcker Rule alone will impose $4.3 billion in burdens, but that figure won't be tallied when OIRA issues its FY 2014 report, which as of this writing, is late.[8] Furthermore, large burdens emanating from Dodd-Frank are also uncounted: Resource Extraction, Conflict Minerals, and the Volcker Rule. In 2012 and 2013 alone, independent agencies published eight rulemakings with at least $100 million in annual costs, for a total burden of more than $4 billion annually.

The original purpose of the Regulatory Right to Know Act was to provide an accounting of all regulatory costs and benefits from "Federal rules," not just cabinet agency rules, in an effort to mirror the fiscal budget. Although the OIRA report to Congress does provide a detailed accounting, excluding all independent agencies from its yearly tallies severely skews the data. Monetizing the benefits from actions by financial regulators, who tend to be independent from the executive, might be difficult, but recent case law suggests it might soon be an imperative.

The Supreme Court's opinion in *Michigan v. EPA* highlights that certain changes should be underway for how OIRA and agencies use benefit-cost analysis. In the Court's opinion, Justice Antonin Scalia wrote, "No regulation is appropriate if it does more harm than good."[9] This is a powerful statement, and although not directly related to benefit-cost analysis across the federal government, the ruling has profound implications for

the regulatory state.

Professor Cass Sunstein, a former OIRA Administrator, recently acknowledged the breadth of the opinion and its potential affect on EPA and independent agencies. He wrote, "[T]he court has now given a strong signal to independent regulatory agencies such as the FTC, the FCC, the Commodity Futures Trading Commission and the Federal Reserve. If they don't weigh the costs against benefits, they might well find themselves in legal jeopardy."[10] The Securities and Exchange Commission has already lost several high-profile cases over its benefit-cost analysis. Because independent agencies are notoriously careless with their analyses, *Michigan v. EPA* should give them added incentive to persuade OIRA that additional scrutiny is warranted. As Professor Sunstein concluded, "The cost-benefit state has arrived."[11]

TRANSPARENCY AT OIRA

Despite several laws and executive orders laying the groundwork for heightened transparency at OIRA, recent troubling events cloud what many view as a secretive government entity. From the Unified Agenda to missing reports to Congress, there is plenty of room for improvement, especially considering that OIRA is breaking the law when it violates many of these transparency measures.

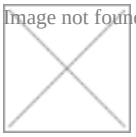
In 2012, the administration decided that they weren't going to publish a spring edition of the Unified Agenda of Regulatory and Deregulatory Actions. This, despite the clear language of governing executive orders and the Regulatory Flexibility Act: "During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda."[12]

Instead, the administration opted to publish a single agenda on December 21, 2012, the Friday before Christmas, the latest an agenda has ever been published. Each subsequent agenda has been released not with an eye toward transparency, but to avoid scrutiny. The next "spring" agenda was published on July 3, with the fall agenda released before Thanksgiving. The spring 2014 agenda was released the Friday night before Memorial Day and the fall agenda on the Friday before Thanksgiving. The most recent spring agenda actually saw some sunlight, with a publication the Thursday, not Friday, before Memorial Day.

How can an agenda on federal regulations that regulators have compiled since 1996 possibly be a controversial or political exercise? Releasing a calendar of pending rulemakings should be viewed as ministerial standard practice, not some game designed to hide the ball on federal regulation. OIRA and the administration should return to traditional "spring" and "fall" publication dates for the Unified Agenda and ensure that all pending rulemakings are included.

Beyond the Unified Agenda, there are concerns with compliance with the Unfunded Mandates Reform Act (UMRA) and the Congressional Review Act (CRA). For both the Unified Agenda and OIRA's website (http://www.reginfo.gov/public/do/eoAdvancedSearchMain), agencies and OIRA are supposed to certify whether the rule would result in unfunded private sector or intergovernmental mandates. Despite the myriad of exemptions in the law, it appears that OIRA routinely omits whether a rule contains unfunded mandates.

Take a recent rule that requires new vehicles to install rear-view cameras. The aim of this measure was to prevent death and injury to pedestrians, typically young children, while the car is in reverse. The rule may very well generate benefits exceeding its costs, but its burdens could total more than $900 million annually, enough to trigger UMRA. However, the Unified Agenda and OIRA's website report that the rule contains no unfunded mandates. See below:



Yet, the rulemaking itself acknowledges UMRA status, "[T]oday's final rule would result in expenditures by the private sector of over $100 million annually."[13] Even GAO acknowledged that the measure contained unfunded mandates: "NHTSA determined that this final rule will result in expenditures by the private sector of over $100 million annually."[14] This was not an isolated incident. AAF found seven other instances where the administration omitted critical data on unfunded mandates, either in the Unified Agenda or on OIRA's website.[15]

There are also thousands of instances where agencies and OIRA are failing to comply with the CRA. In a recent report from the Administrative Conference of the United States, Curtis Copeland found 43 major and significant rules that were never submitted to Congress or GAO, as required by the CRA.[16] This raises serious legal issues because under 5 U.S.C § 804, the OIRA Administrator makes the finding of major rule status. Furthermore, 5 U.S.C § 801 clearly states, "Before a rule can take effect," federal agencies must submit reports to each House of Congress. The Copeland report outlines 1,200 rules published between 2012 and 2013 that could be in legal limbo because of improper procedure.

Under the Regulatory Right to Know Act, the administration "shall prepare and submit to Congress, with the budget" a report outlining "total annual costs and benefits" of federal regulation.[17] Nothing in the law limits reporting to cabinet agencies and the language is clear: the report on costs and benefits is to be submitted with, in a temporal sense, the federal fiscal budget.

However, the current administration rarely complies with this requirement, and as of this writing, it has still not submitted a draft 2015 report to Congress. In 2010 and 2011, the administration published the preliminary report with the budget, and after taking public comment, published the final report later in the year. Then in 2012, the administration waited more than a year to publish the final report. It replicated this practice in 2013 and 2014. Legislative history reveals that there was good reason the "with the budget" language was included in the Regulatory Right to Know Act. Congress and the nation were to be given a view of the administration's fiscal and regulatory record. OIRA has now decoupled these two aspects and has attempted to hide its regulatory record, just as it does with the Unified Agenda.

The reports to Congress are hardly contentious policy documents. They do not receive widespread media attention. For example, the 2014 report received just 11 substantive comments.[18] There are no good reasons why OIRA and the administration should refuse to follow the law and delay publication. I suspect the pending report is already ready for publication and OIRA will report annualized costs of roughly $4.5 billion (in 2010$), compared to benefits near $20 billion, although the actual costs are likely far higher.

IMPLEMENTATION OF EXECUTIVE ORDER 13,563

Despite reform attempts, every year Democrats and Republicans bemoan the current state of regulation. President Obama continued that tradition when he issued Executive Order 13,563, demanding that the "regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It also called on regulators to look back at existing regulations to "modify, streamline, expand, or repeal" those that were redundant or ineffective.

After more than four years of regulatory reform, it's clear that regulators have sought to expand regulations more than modify. Retrospective review reports are filled with more new proposals designed to address current issues, than regulatory reviews designed to examine whether past rules succeeded or failed. For example, energy efficiency standards are included in retrospective reports, even though they are implementing new standards. The Department of Education continues to insist the new "Gainful Employment" regulation that adds billions of dollars in costs and millions of burden hours was somehow designed to scrutinize "existing significant regulations." It clearly was not.

Regulators either engage in an honest attempt to examine the regulatory state by looking back at past rules and measuring their costs and benefits, or they add new burdens that address current problems. Too often, it is the latter. In the most recent retrospective reports, the administration managed to add $2.9 billion in regulatory costs, even though the reports are ostensibly deregulatory in nature. For example, with all the problems that the Department of Veterans Affairs has had in the past, they managed to list just one specific rulemaking. By comparison, the Department of Transportation listed 47 rulemakings, planning to cut $2.5 billion in costs and remove 68.9 million hours of paperwork.

The cabinet-wide success of retrospective review is incredibly uneven. Typically, agencies just implement new regulation under the guise of retrospective review. Take the Department of Energy's recent inclusion of efficiency standards for external power supplies. The rulemaking imposes $3.3 billion in long-term costs;[19] it isn't retrospective. If it is, then all new rulemakings are retrospective. New greenhouse gas standards are retrospective because they "look back" at previous regulations addressing emissions at power plants and then add new standards. Thankfully, EPA has not included these measures in its retrospective reports, but it does include its "Tier 3" rulemaking, which imposes $1.5 billion in annual burdens and its 2017 to 2025 vehicle efficiency standards, at a cost of $10.8 billion. Incredibly, the administration did include new Affordable Care Act regulations in its retrospective reports, perhaps hoping that no one would notice.

On its website touting the success of retrospective review, OIRA proclaims, "review of regulations has resulted in finalized initiatives expected to achieve $20 billion in savings over five years."[20] We have never seen an itemized list of these savings, but we suspect the final annual cost savings reach $4.5 billion, with another $500 million in proposed annual savings. By comparison, measures that increase costs that were included in these reports will add $17.3 billion in annual costs. Thus, on net, the regulatory burden will increase by $12.7 billion annually because of rulemakings contained in these supposedly "retrospective" reviews.

ESSENTIAL PRINCIPLES OF REGULATORY REFORM

It is because regulatory reform has failed so often in the past that we continue to talk about its place in the future. Broadly, regulatory reform should contain three principles:

- Codify the current informal executive orders on benefit-cost analysis and apply those principles to all

federal agencies, with the prospect of judicial review if agencies fail to conduct the legally required analyses.

- Insert intelligible principles in future legislation that limit new regulation, enhance benefit-cost guidelines, and place a timeline for reviewing the efficacy of new rules.
- Create a formal system to retrospectively analyze the past regulations of all agencies. A formal bipartisan commission with diverse expertise could examine existing regulations and submit recommendations to Congress.

Currently, there is nothing stopping the next administration from ending the process of centralized review and abolishing generations-old principles of benefit-cost analysis. Despite the success of benefit-cost analysis, it is not applied equally across the federal government, and even within the executive branch, agencies sometimes omit crucial information or fail to consider regulatory alternatives. Codifying the current executive orders on reform, and extending their scope to powerful independent agencies, would enshrine sound analysis into law. By inserting language on judicial review, another branch of government would be able to exercise important oversight.

Too often, agencies take the broad authority that Congress grants and abuse that power. For instance, in the last few years alone, federal courts have struck down more than a dozen regulations that exceeded the scope that Congress contemplated.[21] AAF experts Ike Brannon and Sam Batkins first broached the idea of an "upstream" approach to regulation in 2011. They wrote:

> "This approach would insert specific guidelines into all major legislation imposing federal mandates, including: 1) requiring agencies to conduct reviews of regulations once implemented, 2) demanding agencies rescind duplicative rules, 3) placing a limit on the number of regulations an agency could promulgate during implementation of a particular law, 4) establishing regulatory 'pay as you go' that would require the elimination of a rule whenever a new rule is adopted, and 5) prohibiting new regulations where costs exceed benefits."[22]

Congress does not have to adopt all five reforms, but including more specific guidelines for agencies could reform the regulatory process and give agencies a greater margin for error when challenged in court. This upstream approach would abolish the current "whack-a-mole" tactics that target current controversial rules and instead focus on crafting sound rules before they become contentious.

There must also be a formal structure to evaluate past regulations to determine whether these measures are still generating significant benefits at an acceptable cost. This is not a partisan exercise. The OECD recommends that nations "adopt a dynamic approach to improve regulatory systems over time to improve the stock of existing and the quality of new regulations."[23]

Currently, there are more than 2,400 federal paperwork requirements, totaling 9.9 billion hours of compliance time for Americans. This is not solely the fault of the current administration, but generations of regulatory accumulation that policymakers have often overlooked. Whether addressing these burdens is conducted by an independent commission or an independent agency, there must be an outside arbiter that forces regulators to examine past rules. The current agency led process will produce piecemeal reforms at best and completely ignore past rules at worst. Without an effort to rescind or amend duplicative rules, any regulatory reform effort will garner only partial success.

This Committee has already considered a piece of legislation that would address past cumulative burdens and future rulemakings. The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act, or

SCRUB, would establish an independent commission to identify duplicative regulations and allow Congress to vote on repeal or amendment. It would also establish a "cut-go" pool for regulators, where they would remove an older duplicative rule if they want to implement a new rule. As AAF found, a 15 percent reduction in regulatory costs, which SCRUB sets, could generate approximately 1.5 billion fewer paperwork hours and anywhere from $48 billion to $90 billion in annual cost savings.[24]

Embedded in the SCRUB Act is a form of a regulatory budget, an idea meriting increased attention on Capitol Hill. Whatever the form of a regulatory budget, cumulative or "one-in, one-out," recent evidence reveals that it can generate tremendous savings without adverse health and safety impacts. For example, the United Kingdom adopted a regulatory budget five years ago and it has saved roughly $1 billion in costs.[25] Meanwhile, particulate matter pollution and greenhouse gas emissions continue to decrease. It is legally doubtful that OIRA could adopt a regulatory budget unilaterally, but AAF proposed the idea of a flexible paperwork budget, which might be more palatable, legally and practically.[26]

CONCLUSION

OIRA has played a critical role in managing the nation's regulatory apparatus for more than a generation. Although critiques of the agency are justified, mainly on transparency grounds, its status as a gatekeeper for federal regulation is vital. In a post *Michigan v. EPA* world, OIRA should exercise enhanced oversight of powerful financial regulators. Better analysis in the future will serve regulations and our economy well, but broader reform would deliver even greater benefits.

Thank you. I look forward to answering your questions.

[1] Sunstein, Cass, "Washington is Eliminating Red Tape," *Wall Street Journal*, available at http://www.wsj.com/articles/SB10001424053111903596904576518652783101190.